UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

EVELYN M. LIBBY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 98-251-P-H***
	)	
MACLEAN-STEVENS	***)***	
STUDIOS, INC., et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff filed an amended seven-count complaint in the instant action in November 1998 asserting claims against her former employer, MacLean-Stevens Studios, Inc. ("MacLean-Stevens"), and its president, Lawrence A. MacLean, for violations of Title VII of the Civil Rights Act of 1964 (Counts I and II), the Equal Pay Act (Count III), the Maine Civil Rights Act (Count IV) and the Maine Whistleblower Protection Act (Count V), as well as for breach of contract (Count VI) and promissory estoppel (Count VII). Amended Complaint for Damages, etc. ("Amended Complaint") (Docket No. 6). Both defendants moved for summary judgment as to all claims against them except for that based on violation of the Equal Pay Act, asserted in Count III of the Amended Complaint. Defendants' Motion for Partial Summary Judgment, etc. ("Defendants' Motion") (Docket No. 11). The plaintiff subsequently agreed to the dismissal with prejudice of Counts I, V, VI and VII of her

amended complaint. Plaintiff's Response to Defendants' Motion for Summary Judgment on Counts I, V, VI, and VII (Docket No. 18). I now recommend that the court grant the defendants' motion for summary judgment with respect to the remaining two claims, Counts II and IV, asserting violations of Title VII of the Civil Rights Act and the Maine Civil Rights Act.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

II. Factual Context

The following facts material to this decision are undisputed except as otherwise noted.

The plaintiff resides in East Lebanon, Maine. Amended Complaint ¶ 1; Defendants' Statement of Material Facts as to Which There Is No Genuine Issue To Be Tried ("Defendants' SMF") (Docket No. 12) ¶ 1. MacLean-Stevens is a New Hampshire corporation doing business in

Maine that promotes, processes, prints and distributes photographs and printed products for schools. Amended Complaint ¶¶ 2, 11; Defendants' SMF ¶ 2; Answer to Amended Complaint ("Answer") (Docket No. 7) ¶ 11. MacLean is president of MacLean-Stevens. Deposition of Lawrence A. MacLean ("MacLean Dep.") at 5. MacLean's wife, Blair MacLean, is vice president of MacLean-Stevens. *Id*. at 3, 63-64.

MacLean-Stevens hired the plaintiff as a makeup artist in September 1991. Amended Complaint ¶ 14; Answer ¶ 14. In or before April 1992 she was promoted to the position of sales representative. *Id*. She signed an eight-page employment agreement dated April 17, 1992. Deposition of Evelyn M. Libby ("Libby Dep.") at 39; Employment Agreement, attached as Exh. A to Defendants' SMF.

MacLean-Stevens's employees routinely engaged in joking and comments of a "vulgar" sexual nature that were offensive to the plaintiff at sales meetings and conventions held approximately six times a year. Libby Dep. at 48-49, 61-62, 95-96, 99-100, 110. In February 1995 Craig A. Morris, general manager of MacLean-Stevens, displayed an image of a partially clothed woman on a large screen during a sales demonstration. Deposition of Craig A. Morris at 4, 69-70. The plaintiff was present and viewed the image. Libby Dep. at 103-04. The image elicited comments of a sexual nature. *Id*. at 105. The plaintiff did not complain to anyone in MacLean-Stevens's management about the routine joking, nor did she voice a complaint about the display of the image of the partially clothed woman. *Id*. at 97-98, 105-06.

In December 1994, while in a hotel room at a convention in Boston, MacLean "cornered" the plaintiff in a chair, attempted to kiss her against her will and grabbed her breasts. *Id*. at 8-9, 111-12, 118-19, 122-24. The plaintiff mentioned MacLean's kissing attempt the next morning to another

MacLean-Stevens employee, Tom Bailey. *Id*. at 49, 128. She also spoke to several other MacLean-Stevens employees and, in the summer of 1995, to her supervisor Peter Coulton about MacLean's behavior in the hotel room. *Id*. at 130-31, 141. The plaintiff told Coulton that she believed Blair MacLean was unhappy about the incident in the hotel room and, as a result, would "constantly just watch everything [the plaintiff did]" and "pick on" her. *Id*. at 130-31. Coulton advised Libby not to "rock the boat." *Id*. at 131.

In or about June 1995 Donna Settino, a co-worker to whom the plaintiff had complained about the incident in the hotel room, was leaving the employment of MacLean-Stevens. MacLean Dep. at 56-57; Libby Dep. at 130. At the time she was leaving, Settino advised MacLean that the company should have a sexual-harassment policy and that he had "better watch [the plaintiff]. She could be trouble." MacLean Dep. at 56-57.

Commencing in spring 1995 MacLean-Stevens made what the plaintiff perceived as a series of negative changes to her work conditions. Libby Dep. at 138-39. Specifically, she states:

(i) In the spring of 1995, Blair MacLean required her to fax a message every morning and every evening describing what she planned to do and had done each day. *Id*. at 138-39. Blair MacLean did not require the other sales representative to send her a fax in the morning. *Id.*

(ii) In the "winter, the beginning of 1996" sales territory was taken from the plaintiff and given to another sales representative. *Id*. at 133-34.

(iii) The plaintiff was told that, as a regular part of her job, she would have to be a "helper" on photographic shoots for accounts she signed during the spring of 1996.[1] *Id*. at 143-44.

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[1]The defendants cite the plaintiff's amended complaint for the proposition that adverse changes, including that to the plaintiff's territory, were made in or about September 1995. (continued...)

(iv) In March 1996 MacLean-Stevens notified the plaintiff that it would not be renewing her employment agreement for another one-year period. Amended Complaint ¶ 34; Answer ¶ 34; Libby Dep. at 72.

Prior to the beginning of 1996 MacLean-Stevens never expressed dissatisfaction with the plaintiff's work. Libby Dep. at 132-34.

According to the defendants:

(i) The plaintiff was treated the same as other employees regarding clerical duties. Letter from Edith Kessler to Evelyn M. Libby dated April 16, 1998 ("EEOC Letter"), attached as Exh. C to Affidavit of John H. Rich III in Support of Defendants' Motion for Partial Summary Judgment ("Rich Aff.") (Docket No. 13), at 1.[2] The plaintiff's job duties included office work well before any alleged incidents of sexual harassment. *Id*.

(ii) Staff members were required to call in reports daily. *Id*. Because the plaintiff did not submit her call reports in a timely fashion, and those that she did submit were not substantive,

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[1](...continued)
Defendants' SMF ¶ 12; Amended Complaint ¶¶ 26-31. For purposes of this motion, I accept the version of the facts most favorable to the plaintiff.

[2]The plaintiff challenges the defendants' use of the contents of the EEOC Letter as constituting inadmissable hearsay and legal conclusions. Plaintiff's Objection to Defendant's [sic] Motion for Summary Judgment on Counts II and IV, etc. ("Plaintiff's Objection") (Docket No. 20) at 6-7. The defendants correctly note that Federal Rule of Evidence 803(8) provides that "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." *See* Defendants' Reply Memorandum in Support of Their Motion for Partial Summary Judgment ("Defendants' Reply") (Docket No. 25) at 3 n.5; *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) (portions of investigatory reports stating conclusions, opinions admissible if based on factual investigation and satisfy trustworthiness requirement of Rule 803(8)(C)). Facts extracted from the EEOC Letter accordingly are properly before the court for purposes of the instant summary-judgment motion.

MacLean-Stevens took additional action regarding the call reports. *Id*.

(iii) Territory adjustments were made for legitimate business reasons. *Id*. When the plaintiff was hired, her territory was informally carved out of what had been another individual's territory. *Id*. When disputes arose because of the informality of the division, the general manager divided the territory by school enrollment. *Id*. at 1-2. Several decisions were made in the plaintiff's favor. *Id*. at 2. She was given more "shots" than one salesperson, and a disputed school district was awarded to her instead of another salesperson. *Id*.

(iv) There were personality differences between the plaintiff and a number of people on staff. *Id*. at 1. The plaintiff was described as having a negative attitude and being "disputatious." *Id*.

(v) The plaintiff's contract was not renewed because of these personality issues and because MacLean-Stevens felt she was not devoting substantially all of her time to her job, which MacLean-Stevens considered a violation of her contract. *Id*. at 2. MacLean-Stevens was aware that the plaintiff had an independent business. *Id*. It was dissatisfied with the plaintiff's coverage of her territory and informed her of the same. *Id*.

On October 28, 1996 the plaintiff filed an employment-discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). Charge of Discrimination, attached as Exh. A to Rich Aff. By letter dated April 16, 1998 the EEOC notified Libby of its conclusion that "[t]he evidence does not support your allegations of unlawful discrimination." EEOC Letter at 1-2.

III. Discussion

A. Retaliation Claim

The defendants first seek summary judgment with respect to Count II of the Amended

Complaint, in which the plaintiff charges that MacLean-Stevens violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), by retaliating against her for complaints of sexual harassment and sex discrimination. *See* Amended Complaint ¶¶ 48-53; Defendants' Motion at 7-9; Defendants' Reply at 2-3.

Title VII prohibits employers, *inter alia*, from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." 42 U.S.C. § 2000e-3(a). In a case such as this, in which a plaintiff offers no direct evidence of retaliation, he or she must satisfy the burden-shifting test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in order to prevail. *King v. Town of Hanover*, 116 F.3d 965, 968 (1st Cir. 1997). The plaintiff must first make out a *prima facie* showing of retaliation. *Id.* If he or she succeeds, the burden of production shifts to the defendant to set forth a legitimate, nondiscriminatory reason for adverse employment actions. *Id.* "The production of such a nondiscriminatory reason dispels the presumption of improper discrimination generated by the prima facie showing of discrimination." *Id.* (citations omitted). The plaintiff must then demonstrate that the proffered reason is actually a pretext for retaliation. *Id.*

> To establish a *prima facie* case, a plaintiff must show:
>
> > (1) that he engaged in an activity protected under Title VII or engaged in protected opposition to an activity, which participation or opposition was known by the employer; (2) one or more employment actions disadvantaging him; and (3) a causal connection between the protected activity and the employment action.

Id. (citations omitted). The defendants argue that the plaintiff's claim falters at this starting gate inasmuch as most of the activity complained of is cut off by "the 300-day jurisdictional limit." Defendants' Motion at 8. An employment-discrimination charge that is first filed with an

appropriate state agency must be filed with the EEOC within 300 days of the alleged discrimination. *Provencher v. CVS Pharm.*, 145 F.3d 5, 13 (1st Cir. 1998) (citing 42 U.S.C. § 2000e-5(e)). Accordingly, the defendants assert, any alleged conduct occurring before the cutoff date of January 2, 1996 must be ignored.[3] Defendants' Motion at 8. The plaintiff counters that, to the extent any conduct occurred prior to the cutoff date, it may yet be reeled back into consideration via the mechanism of the "serial violation" exception to the cutoff rule. Plaintiff's Opposition at 9.

Viewing the record in the light most favorable to the plaintiff with respect to the dates on which she alleges that retaliation (as opposed to underlying sexual harassment) occurred, it becomes quickly apparent that nearly all of the relevant conduct occurred after the cutoff date. The reshuffling of sales territory, the "photographic helper" assignment and the non-renewal of the plaintiff's contract all occurred after January 2, 1996. Indeed, among adverse conditions alleged, only the fax requirement occurred outside of the 300-day window. The serial-violation doctrine, however, does not succeed in retrieving this incident inasmuch as the plaintiff's summer 1995 conversation with her supervisor reveals her perception at the time that the requirement was retaliatory.[4] *See Provencher*, 145 F.3d at 14 ("the continuing violation claim will fail if the plaintiff was or should have been aware that he was being unlawfully discriminated against while the earlier acts, now

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[3]There is no evidence of record that the plaintiff filed her claim with the Maine Human Rights Commission as well as the EEOC, thereby affording her an extended 300-day limitations period instead of the 180-day period applicable to charges filed solely with the EEOC. *See EEOC v. Green*, 76 F.3d 19, 22-24 (1st Cir. 1996). Inasmuch as both sides assume application of the 300-day limitations period, however, I shall do likewise.

[4]The imposition of the faxing requirements, in addition, predated the plaintiff's complaint to her supervisor about the hotel-room incident. Assuming *arguendo* that the plaintiff's prior complaints to co-workers amounted to "protected activity" for purposes of Title VII, she adduces no evidence that Blair MacLean knew of them at the time the fax requirements were imposed.

untimely, were taking place") (citation omitted).

The defendants next assert that even if the alleged retaliation took place within the 300-day window, the court cannot consider the underlying complaint upon which it assertedly was based because that conduct itself took place outside of the 300-day window. Defendants' Reply at 2. Disregarding that conduct, the defendants suggest, unravels the plaintiff's *prima facie* retaliation claim. *Id*. In so arguing, the defendants lose sight of the material question: whether allegedly actionable conduct (in this case, retaliatory acts) occurred within the statute-of-limitations period. *See, e.g., Green*, 76 F.3d at 20 ("a charge can be filed with the EEOC up to 300 days after the discriminatory act"). To the extent that such conduct falls within the limitations period, there is no arbitrary preclusion of consideration of subsidiary facts that are, or may be, material to the primary conduct.[5]

The defendants finally contend that, even assuming *arguendo* that the plaintiff makes out a *prima facie* case of retaliation, she fails to raise any triable issue that the defendants' proferred reasons for their adverse employment actions were pretextual. Defendants' Reply at 3. At bottom, they note, the plaintiff rests her retaliation case on inferences drawn from adverse actions taken five or more months after her complaint to her supervisor and the lack of expression of any dissatisfaction with her work performance prior to 1996. *Id*. Evidence of this nature is insufficient as a matter of law to survive summary judgment on a retaliation claim, the defendants assert. *Id*. They are correct.

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[5]The defendants misread this court's opinion in *Perkins v. Champion Int'l Corp.*, Docket No. 95-249-B, 1997 WL 97106 (D. Me. Feb. 24, 1997), in which the court stated, "Perkins's claims of sexual harassment and retaliation must be based on facts that she alleges took place within 300 days of January 28, 1994. In other words, the Court will consider only facts that Perkins alleges occurred on or after April 3, 1994." *Id*. at *1. The court referred to the facts of the discriminatory acts complained of — not to facts in general. *See, e.g., id.* at *6 (discussing events of 1991-93 relevant to retaliation claim).

The First Circuit has made clear that such evidence does not generate a triable issue whether an employer was motivated by retaliatory animus. *See, e.g., King*, 116 F.3d at 968 (evidence challenging appropriateness of discipline, demonstrating that adverse actions taken five months after complaint, insufficient to present jury question on retaliation claim).

B. Maine Civil Rights Act Claim

The defendants finally seek summary judgment with respect to Count IV, in which the plaintiff charges both defendants with violating the Maine Civil Rights Act, 5 M.R.S.A. § 4682, by "intentionally interfer[ing] with Plaintiff's right to equal protection under the laws and to be free from discrimination through the use of physical force and by the threat of physical force." Amended Complaint ¶ 61; *see also* Defendants' Motion at 9-10; Defendants' Reply at 4.

Section 4682 provides in relevant part:

> Whenever any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat of physical force or violence against a person, damage or destruction of property or trespass on property with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State or violates section 4684-B, the person whose exercise or enjoyment of these rights has been interfered with, or attempted to be interfered with, may institute and prosecute in that person's own name and on that person's own behalf a civil action for legal or equitable relief.

The plaintiff's claim fails, the defendants contend, because the statute is designed to provide redress for wrongs not otherwise remediable and, in this case, the factual predicate of the plaintiff's claim is redressable under Title VII. Defendants' Motion at 10; *LaPlante v. United Parcel Serv., Inc.*, 810 F. Supp. 19, 22-23 (D. Me. 1993). The plaintiff apparently concedes the point with respect to McLean-Stevens but not with respect to MacLean. Plaintiff's Opposition at 9-10. An individual,

the plaintiff points out, may not be held liable under Title VII and hence her claim against MacLean is not redressable thereunder. *Id.* at 10. The defendants rejoin that this distinction is immaterial inasmuch as MacLean-Stevens may be held liable for MacLean's conduct and, hence, the conduct complained of is remediable under Title VII. Defendants' Reply at 4. The defendants have the better of the argument. As this court has noted, section 4682 is concerned as an overarching matter with remediation of violation of rights. *LaPlante*, 810 F. Supp. at 22. Title VII is designed to remediate interference with the right "to be free from discrimination," as the plaintiff identifies it in her amended complaint. Amended Complaint ¶ 61. Hence, the plaintiff may not separately seek vindication of the same right, arising from the same core facts, through the Maine Civil Rights Act.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for partial summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of March, 1999.

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David M. Cohen
United States Magistrate Judge